COMMENTS

EXCLUSIONARY ZONING: THE *MOUNT LAUREL* DOCTRINE AND THE IMPLICATIONS OF THE *MADISON TOWNSHIP* CASE

Ostensibly, the purpose behind the enactment of any zoning ordinance is to regulate the use of the land within a particular jurisdiction.[1] In New Jersey, the judicial responses to zoning have evolved from outright disapproval,[2] through presumed validity,[3] to

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[1] *See generally* D. MANDELKER, THE ZONING DILEMMA 2–4 (1971); 1 N. WILLIAMS, AMERICAN PLANNING LAW, LAND USE AND THE POLICE POWER §§ 16.01–.14 (1974); 1 E. YOKLEY, ZONING LAW AND PRACTICE §§ 1–10 to –15 (3d ed. 1965); Anderson, *Introduction to Symposium on Exclusionary Zoning*, 22 SYRACUSE L. REV. 465, 465–67 (1971); *see also* D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 5–9 (1977) (although the theory behind zoning is the imposition of a comprehensive land use plan, in reality zoning ordinances are enacted to slow municipal growth and prevent continued development).

[2] *See* Stein v. City of Long Branch, 2 N.J. Misc. 121 (Sup. Ct. 1924). The facts of the case were that a realtor desired to build six bungalows along a strip of beachfront land. The town attempted to prevent this by enacting a zoning ordinance which required that all buildings within plaintiff's zone be on lots of 150 by 250 feet, be two and one-half stories high, and sell for a minimum of $15,000. *Id.* at 122. The court unequivocally stated that "the restrictive provisions of the zoning ordinance . . . are clearly unreasonable, and, therefore, unconstitutional." *Id.* at 123.

Professor Williams characterizes the New Jersey posture toward zoning as hostile in this first stage. 1 N. WILLIAMS, *supra* note 1, § 6.04.

[3] *See, e.g.*, Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed per curiam*, 344 U.S. 919 (1953). In an opinion written by Chief Justice Vanderbilt, the court upheld an ordinance which contained severe minimum requirements on dwelling size. 10 N.J. at 167–69, 89 A.2d at 694–95. The court stated that there was no doubt that the municipality could impose minimum floor space requirements, *id.* at 171, 89 A.2d at 696, and that those enacted in this situation were reasonable since they promoted the general welfare of the community, *id.* at 174–75, 89 A.2d at 697–98. The court drew its rationale from the language in three previous cases: Schmidt v. Board of Adjustment, 9 N.J. 405, 422, 88 A.2d 607, 615 (1952) (local zoning ordinances will be upheld so long as they bear a reasonable relation to the general welfare); Duffcon Concrete Prods. v. Borough of Cresskill, 1 N.J. 509, 513, 64 A.2d 347, 349–50 (1949) (the most appropriate use of land within a municipality depends, in large part, on the characteristics of that municipality); and Brookdale Homes, Inc. v. Johnson, 126 N.J.L. 516, 524, 19 A.2d 868, 872 (Ct. Err. & App. 1941) (dissenting opinion urged that zoning ordinances should be upheld if they allocate land "to the uses best suited to the *good of the community*" (emphasis added)). 10 N.J. at 171–75, 89 A.2d at 696–98. The thrust of the cited portions of these cases is that a zoning ordinance is entitled to a presumption of validity as long as it reasonably promotes the general welfare of the particular municipality.

strict scrutiny in order to insure compatability with regional needs.[4] Initially, the Supreme Court of New Jersey rejected attempts to restrict the uses of property by municipalities.[5] However, as large areas of the state began to develop and to acquire identifiable characteristics, the court adopted the view that there should be a strong presumption in favor of the validity of a municipality's zoning ordinances.[6] As haphazard, sprawling land use continued, the court became aware of the intense competition among municipalities to attract tax ratables and of the collateral tendency to attempt to exclude, through zoning, lower income groups. This precipitated the realization that regional needs must take precedence over local preferences.[7]

The result of this growing sentiment was the pivotal decision of *Southern Burlington County NAACP v. Township of Mount Laurel*.[8] Subsequently, the court offered a more detailed explanation of its approach to the available remedies for exclusionary zoning in *Oakwood at Madison, Inc. v. Township of Madison*.[9] The combined impact of these decisions has signaled a reversal of the court's previous

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The opinion in the *Wayne Township* case has been severely criticized for lack of careful analysis and for "evincing extreme judicial abnegation." Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1051–53 (1953).

[4] *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

[5] *See, e.g.*, Brookdale Homes, Inc. v. Johnson, 126 N.J.L. 516, 19 A.2d 868 (Ct. Err. & App. 1941) *aff'g*, 123 N.J.L. 602, 10 A.2d 477 (Sup. Ct. 1940). In this case the court affirmed, per curiam, the lower court's decision that the enactment of a zoning ordinance allowing only single family detached houses was ultra vires the municipality. The dissent argued that this type of regulation should be permitted where it reasonably promoted valid municipal goals. 126 N.J.L. at 521, 19 A.2d at 870 (Heher, J., dissenting).

[6] *See* Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952); Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed per curiam*, 344 U.S. 919 (1953). In the *Fischer* case, the court went so far as to approve a zoning ordinance establishing residential zones of either one-half or five acre lots. 11 N.J. at 198–99, 93 A.2d at 380. It was concluded that such zoning helped preserve the rural character of the community while maintaining property values. *Id.* at 205, 93 A.2d at 384.

[7] *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); 1 N. WILLIAMS, *supra* note 1, § 6.04; 3 *id.* § 66.13f (Addendum 1975). *See also* Williams & Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475, 498–502 (1971).

[8] 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

[9] 72 N.J. 481, 371 A.2d 1192 (1977). Subsequent to the inception of this litigation, the Township of Madison changed its name to Old Bridge. *Id.* at 491 n.1, 371 A.2d at 1196.

laissez faire approach to the validity of local zoning practices.[10] In *Mount Laurel*, the court assumed an activist role in dealing with the problem of exclusionary zoning by announcing a new principle which placed an affirmative obligation on municipalities to encourage economically balanced communities.[11] In the *Madison Township* case, the court attempted to make the policy goals enunciated in *Mount Laurel* realistically attainable by effecting a tactical retreat from the expansive language of that decision.[12] This Comment will examine the current status of the New Jersey supreme court's revolutionary approach to exclusionary zoning.[13]

THE *MOUNT LAUREL* DOCTRINE

The decision in *Mount Laurel* has been hailed as one of the most significant advances in zoning law in the past five decades.[14] In that case, the New Jersey supreme court abandoned its previous policy of holding that a municipality's zoning ordinances were entitled to a presumption of validity[15] and that the promotion of the general welfare of the individual municipality was the sole legitimate goal of such ordinances.[16] The case arose as a class action on behalf of minority

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[10] *See* 1 N. WILLIAMS, *supra* note 1, § 6.04.

[11] *See* 67 N.J. at 174, 336 A.2d at 724–25.

[12] *See* 72 N.J. at 498–501, 510–14, 524–44, 371 A.2d at 1200–01, 1206–08, 1216–23.

[13] The most controversial aspect of exclusionary zoning litigation concerns the effectiveness, extent and advisability of judicial remedies. *See generally* Mallach, *Do Lawsuits Build Housing?: The Implications of Exclusionary Zoning Litigation*, 6 RUT.-CAM. L.J. 653 (1975); Mytelka & Mytelka, *Exclusionary Zoning: A Consideration of Remedies*, 7 SETON HALL L. REV. 1 (1975); Rose, *The Mount Laurel Decision: Is It Based on Wishful Thinking?*, 4 REAL ESTATE L.J. 61 (1975); Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976); Note, *A Wrong Without A Remedy: Judicial Approaches to Exclusionary Zoning*, 6 RUT.-CAM. L.J. 727 (1975).

[14] *See, e.g.*, 3 N. WILLIAMS, *supra* note 1, § 66.13b (Addendum 1975); Williams & Doughty, *Studies in Legal Realism:* Mount Laurel, Belle Terre *and* Berman, 29 RUTGERS L. REV. 73, 94 (1975) (suggestion that *Mount Laurel* surpasses in importance the landmark zoning case Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)). It was in *Euclid* that the practice of zoning was held to be constitutional. *Id.* at 386–90.

[15] 67 N.J. at 176–77, 336 A.2d at 726.

[16] *Compare id.* at 188–91, 336 A.2d at 732–33 *with* Fischer v. Township of Bedminster, 11 N.J. 194, 202–05, 93 A.2d 378, 382–84 (1952) *and* Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 174–76, 89 A.2d 693, 697–98 (1952), *appeal dismissed per curiam*, 344 U.S. 919 (1953).

Interestingly, it was somewhat by chance that the *Mount Laurel* case, rather than the *Madison Township* case became the vehicle for the court's new doctrine. At least one commentator felt that the court would utilize the *Madison Township* case to announce its policy. 3 N. WILLIAMS, *supra* note 1, § 66.10. Both cases had been granted certification after trial court decisions had invalidated the townships' zoning ordinances. Southern Burlington County NAACP v. Township of Mount Laurel, 119 N.J. Super. 164,

poor living in and around Mount Laurel, who claimed that the effect of the township's zoning ordinance was to exclude them from residing in that community.[17]

The decision rendered in *Mount Laurel* was significant not merely for the fact that it announced a new judicial approach to land use regulation, but for the novel way in which the court framed the issue.[18] Justice Hall, writing for the court, made it clear that the

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290 A.2d 465 (Law Div.), *cert. granted*, 62 N.J. 190, 299 A.2d 724 (1972); Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Law Div.), *cert. granted*, 62 N.J. 185, 299 A.2d 720 (1971). The cases were then initially heard together by the supreme court in March 1973. *See* 3 N. WILLIAMS, *supra* § 66.12 (Addendum 1975). A reargument was scheduled for January 1974. Professor Williams suggests that this may have been due to the fact that several justices were retiring; thus, a new court would be responsible for implementing any decision reached. *Id.* However, by this time, Madison had substantially amended its "invalid" zoning ordinance and that case had to be remanded for a new trial to determine the validity of the amended ordinance. Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 383 (Law Div.), *cert. granted*, 62 N.J. 185, 299 A.2d 720 (1971), *on remand*, 128 N.J. Super. 438, 320 A.2d 223 (Law Div. 1974).

As a result of these circumstances, the important policy decided became known as the *Mount Laurel* doctrine. This doctrine, as reflected in the holding of the case, is that each developing

> municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity . . . for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.

67 N.J. at 174, 336 A.2d at 724.

For a discussion of this doctrine, see generally D. MOSKOWITZ, *supra* note 1, at 225–45; Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L. FORUM 1; Rohan, *Property Planning and the Search for a Comprehensive Housing Policy—The View from* Mount Laurel, 49 ST. JOHN'S L. REV. 653 (1975); Rose, *supra* note 13; Williams & Doughty, *supra* note 14; Comment, Southern Burlington County NAACP v. Township of Mount Laurel: *Municipalities Must Zone to Provide a Fair Share of Regional Housing Needs*, 5 N.Y.U. REV. L. & SOC. CHANGE 203 (1975).

[17] 67 N.J. at 159 & n.3, 336 A.2d at 717. Though the court was aware of the fact that the particular plaintiffs were, in fact, predominantly black and hispanic poor, Justice Hall specifically noted that the exclusionary effects of the ordinance operated on the much broader category of economically less advantaged persons. This included the elderly, the young, unmarried persons and those with growing families. *Id.*

[18] *Id.* at 173, 336 A.2d at 724. Whereas, in previous cases, the issue was whether the zoning ordinance reasonably promoted the general welfare of the township, *see, e.g.*, Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952) and Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed per curiam*, 344 U.S. 919 (1953), the *Mount Laurel* court took the issue to be whether any municipality could, by its zoning ordinance, practice economic discrimination. *See* 67 N.J. at 173, 336 A.2d at 724. Without such a rephrasing of the issue, the significance of the exclusionary zoning problem may have been overlooked.

zoning ordinance would be judged solely on its exclusionary effect upon those seeking low and moderate income housing.[19] Thus, the issue was one of economic discrimination only: whether a developing municipality could effectively exclude low and moderate income persons from residency within its boundaries by means of a system of land use regulation which would make the construction of low and moderate income housing "physically and economically impossible."[20]

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[19] *See* 67 N.J. at 173, 336 A.2d at 724. The court had also pointed out, earlier in the opinion, that the impact of this "issue . . . is not confined to Mount Laurel." *Id.* at 160, 336 A.2d at 717.

[20] *Id.* at 173, 336 A.2d at 724. The examination of Mount Laurel as a developing municipality is an important aspect of the opinion, especially since two recent cases have made it clear that the *Mount Laurel* doctrine does not apply to municipalities which cannot be characterized as developing. Fobe Assoc. v. Mayor & Council of Demarest, 74 N.J. 519, 379 A.2d 31 (1977); Pascack Ass'n, Ltd. v. Mayor & Council of Township of Washington, 74 N.J. 470, 379 A.2d 6 (1977).

Mount Laurel was found to be "a part of the outer ring of the South Jersey metropolitan area." 67 N.J. at 162, 336 A.2d at 718. The town had experienced an extraordinary increase in population in the last two decades. The 1950 population of 2,817 had nearly doubled by 1960 to 5,249. This figure also more than doubled by 1970 to a total of 11,221. *Id.* at 161, 336 A.2d at 718. During the decade from 1960 to 1970, Mount Laurel's population density increased from 238.0 to 506.6 per square mile. NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, DIVISION OF STATE AND REGIONAL PLANNING, NEW JERSEY MUNICIPAL PROFILES INTENSITY OF URBANIZATION 8 (1972). By way of comparison, the corresponding figures for the nearby city of Camden, clearly not a developing municipality, were 13,466.6 per square mile in 1960 and 11,814.6 in 1970—a 12.5% *decrease* in population. *Id.* at 10.

Despite this fantastic rate of growth, "65% of the township [was] still vacant land or in agricultural use." 67 N.J. at 162, 336 A.2d at 718. In addition, the excellent highway system surrounding the township augured well for continuing growth of both population and job opportunities. *Id.* at 162–63, 336 A.2d at 718–19. Both the New Jersey Turnpike and Interstate Highway 295 run through Mount Laurel, and state routes 70, 73 and 38, as well as U.S. 130, are easily accessible. *Id.* at 162, 336 A.2d at 718.

The specifics of the challenged ordinance were that it provided four residential zones, each permitting only detached, one-family homes. *Id.* at 163, 336 A.2d at 719. The zones were denominated R-1, R-1D, R-2 and R-3. Housing development was prominent in the R-1 and R-2 zones, whereas most of the town's substandard housing was located in the R-3 zone. *Id.* at 163–64, 336 A.2d at 719–20. The R-1 zone required, *inter alia*, building on a lot of no less than 9,375 square feet (slightly less than one-quarter acre), a minimum dwelling floor area of 1,100 square feet for one story buildings and 1,300 square feet for buildings of one and one-half stories or higher. The R-2 zone required minimum floor area of only 900 square feet. However, "minimum lot size was 11,000 square feet." *Id.* at 164, 336 A.2d at 719. The R-3 zone required a minimum lot size of 20,000 square feet, with floor area requirements as in the R-1 zone. *Id.*, 336 A.2d at 719–20. The R-1D zone was taken from the R-3 zone with the minimum lot size reduced to 10,000 square feet. *Id.* at 165, 336 A.2d at 720. Construction could only be undertaken, however, so long as the overall dwelling density of the entire zone did not exceed 2.25 units per acre, or, in effect about one house for each half acre. The houses, though, would be "clustered" together, with "a minimum of 15% and a maximum of 25% of the total acreage" to be dedicated by the developer to municipal purposes such as parks, schools or public buildings. *Id.* at 165, 336 A.2d at 720. For a more thorough

The court concluded that every developing municipality must take into consideration the low and moderate income housing needs of the "region" of which it is a part when drafting its zoning ordinances and specifically provide for its "fair share" of that regional need.[21] Ful-

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discussion of this practice, known as cluster zoning, see 2 N. WILLIAMS, *supra* note 1, §§ 47.01–.05.

These minimum lot size and minimum dwelling floor area requirements were found to have the effect of "allow[ing] only homes within the financial reach of persons of *at least* middle income." 67 N.J. at 164, 336 A.2d at 719 (emphasis added). The court referred to the general categories of low and moderate income guidelines set by the trial court in Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 445, 320 A.2d 223, 227 (Law Div. 1974). 67 N.J. at 158 n.2, 336 A.2d at 716. In that decision, Judge Furman referred to families with incomes up to $7,000 per year as low income and those with incomes from $10,000 to $12,000 per year as being in the moderate income category. 128 N.J. Super. at 445 & n.3, 320 A.2d at 227. The *Mount Laurel* court cites these figures approvingly and classifies middle and upper income as simply "designations of higher income categories." 67 N.J. at 158 n.2, 336 A.2d at 716.

It was not until late 1971 that Mount Laurel had approved some multi-family housing projects. *Id.* at 166, 336 A.2d at 720–21. The township had authorized planned unit development (PUD) zones in late 1967. *Id.*, 336 A.2d at 721. The PUD concept stresses regulation of density rather than lot size and floor area. Thus, a developer may arrange with the township to construct a variety of housing units and other structures for a variety of uses on a particular tract of land, so long as the density of that area is within the established limit. This permits a mixture of such uses including single-family dwellings (both attached and detached), garden apartments, high rise apartments, town houses, and possibly some commercial structures. *Id.*, 336 A.2d at 720–21. For a general discussion of the PUD concept, see 2 N. WILLIAMS, *supra* §§ 48.01–.12. Mount Laurel's zoning ordinance permitting PUDs was repealed in 1971, in the midst of a legal challenge to its validity. 67 N.J. at 166 n.5, 336 A.2d at 721; *see* Rudderow v. Township Comm. of Mount Laurel, 114 N.J. Super. 104, 274 A.2d 854 (Law Div. 1971), *rev'd*, 121 N.J. Super. 409, 297 A.2d 583 (App. Div. 1972). Prior to the repeal, the township had approved four PUD projects; these approvals were not revoked. 67 N.J. at 166, 336 A.2d at 721.

The supreme court found that these projects, too, were approved expressly to attract "only persons of medium and upper income." *Id.* at 167, 336 A.2d at 721. The court found that any housing actually constructed in the PUD sites would be "beyond the financial reach of low and moderate income families, especially those with young children." *Id.* This was due to the limitation on the number of one-bedroom units, and certain cost-generating features of the ordinance. For example, developers would be required to pay school costs in the event that the number of school children per multi-family development exceeded .3; developers would also be required to provide such amenities as central air conditioning and to contribute to fire protection and ambulance services. All of these exactions would inevitably inflate the ultimate rental amount. *Id.* at 168, 336 A.2d at 721–22.

[21] 67 N.J. at 174, 336 A.2d at 724. The motivation for exclusionary land use regulation was rooted in the township's desire to maintain an acceptable tax structure within the municipality, *i.e.*, to keep the demand for services stable while increasing the number of people and dwelling units which would add favorably to the tax base. *Id.* at 170–71, 336 A.2d at 723. Obviously, low and moderate income families would contribute negatively to this fiscal goal, since their need for services would surpass their ability to pay for them through property taxes. *See id.* at 171–73, 336 A.2d at 723–24.

Basically, the town, if successful in this zoning effort, would have been able to

fillment of this obligation was labeled a presumptive purpose for zoning, and any municipality attempting to avoid it would be required to meet a heavy burden of showing special circumstances which would relieve it of this obligation.[22]

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remain a desirable enclave for upper income groups in the midst of a rapidly developing region, while avoiding any share of the costs of this development in the form of higher property taxes needed to pay for schools and social services. *See id.* at 195, 336 A.2d at 736 (Pashman, J., concurring). This attempt to use zoning regulations to control fiscal burdens was totally rejected by the court. *See* notes 38–41 *infra* and accompanying text; Ackerman, *supra* note 16, at 17 n.84. The court found "the basic importance of the opportunity for appropriate housing for all classes of our citizenry" to be the overriding concern. 67 N.J. at 186, 336 A.2d at 731.

[22] 67 N.J. at 174, 336 A.2d at 724. Intent to exclude those of a particular class need not be shown, so long as the effect of the ordinance is to exclude them. *Id.* at 174 & n.10, 336 A.2d at 724–25. There may be some room to argue this point, since in the *Madison Township* case, courts were directed to examine both the substance of the challenged ordinance and the bona fide efforts toward eliminating obstacles to low cost housing. *See* 72 N.J. at 499, 371 A.2d at 1200; notes 144–46 *infra* and accompanying text.

The court's holding was based solely on state constitutional grounds, 67 N.J. at 174, 336 A.2d at 725, effectively precluding review by the Supreme Court. D. MOSKOWITZ, *supra* note 1, at 236; *see* 3 N. WILLIAMS, *supra* note 1, § 66.13b (Addendum 1975). This also precludes legislative override, and is so stated by the *Madison Township* court. 72 N.J. at 496, 371 A.2d at 1199; *see* D. MOSKOWITZ, *supra* at 236. Moskowitz points out that one reason to avoid basing the decision on federal constitutional grounds is to prevent the possibility of an adverse decision by the Supreme Court. He further notes that the *Mount Laurel* decision is based primarily on economic discrimination and not racial discrimination. *Id.* at 66. He then suggests that a challenge to a zoning ordinance solely on economic grounds would not succeed in federal court since discrimination on the basis of wealth has not yet been clearly established as a suspect classification under the fourteenth amendment. *Id.* at 101–05. For further discussion of the difference in the federal approach on this point, see Ackerman, *supra* note 16, at 5–9.

The *Mount Laurel* court's approach was simply to recognize that land use regulation is within the police power of the state. 67 N.J. at 174, 336 A.2d at 725. Article IV, § VI, ¶ 2 of the New Jersey constitution authorizes legislative delegation of the zoning power to municipalities. The pertinent part of that section of the constitution reads as follows:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State.

The constitution further requires that all action taken pursuant to the state's police power conform to the requirements of due process and equal protection. The section of the New Jersey constitution interpreted as requiring equal protection and due process is art. I, ¶ 1, which reads as follows:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

See 67 N.J. at 174–75, 336 A.2d at 725. Therefore, the delegated zoning power, like any

In previous decisions, the court had tested the validity of zoning ordinances by determining whether they furthered the "general welfare," a concept which had been equated with the preferences of the municipality.[23] The *Mount Laurel* court concluded that the "extreme, long-time need . . . for decent low and moderate income housing"[24] required that the term "general welfare" be interpreted to encompass those citizens beyond the municipality's borders who need and desire such housing.[25] Having found Mount Laurel's ordinance presumptively invalid as failing to promote this expanded concept of general welfare,[26] the court nevertheless examined the arguments advanced

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other police power, must be used to affirmatively promote the general welfare, *id.* at 174–75, 336 A.2d at 724–25, and this requires that "the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served." *Id.* at 177, 336 A.2d at 726.

[23] *See, e.g.*, Fischer v. Township of Bedminster, 11 N.J. 194, 202–05, 93 A.2d 378, 382–84 (1952); Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 171–73, 89 A.2d 693, 696–97 (1952), *appeal dismissed per curiam*, 344 U.S. 919 (1953). The *Mount Laurel* court points out that language in these previous opinions foreshadowed the possibility of a change in approach should circumstances so dictate. 67 N.J. at 176–77, 336 A.2d at 725–26. This warning is most plainly stated in the case of Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955). In that case, the court had held valid a zoning ordinance which prohibited hotels and motels from residential districts while permitting boarding houses. *Id.* at 19–21, 30, 118 A.2d at 401–03, 408. The court had also acknowledged the criticism of its *Wayne Township* and *Bedminster Township* decisions, *see* notes 3 and 6 *supra*, but reiterated its position, that under "existing population and land conditions" at the time of those decisions, there was no real threat to any particular class of citizens. *Id.* at 29, 118 A.2d at 407–08. However, a terse warning was issued: "If and when conditions change, alterations in zoning restrictions and pertinent legislative and judicial attitudes need not be long delayed." *Id.*, 118 A.2d at 408.

[24] 67 N.J. at 179, 336 A.2d at 727. An argument can be made that the New Jersey supreme court has, in effect, found the right to decent housing to be one of the basic rights guaranteed under the New Jersey constitution's substantive due process and equal protection clause, paragraph one of article one. The statement is made in *Mount Laurel* that "[i]t is plain beyond dispute that proper provision for adequate housing of all categories of people is *certainly an absolute essential* in promotion of the general welfare required in all local land use regulation." *Id.* (emphasis added).

It would seem that if the right to decent housing were not a fundamental one, then the concept of general welfare would not, as "an absolute essential," encompass that right. *Id.* The United States Supreme Court has not, as yet, declared the right to housing as one of those basic rights protected by the fourteenth amendment.

[25] *Id.*

[26] *Id.* at 180–85, 336 A.2d at 728–30. The fact that the ordinance provided only for detached one family homes weighed heavily against it. In addition, the cost generating features in the PUD zone and the minimum lot and floor area requirements in the residential zones, *see* note 21 *supra*, combined to insure that whatever housing could be constructed would be beyond the reach of those in low and moderate income categories. 67 N.J. at 182–84, 336 A.2d at 729–30. The court reached the "irresistible" conclusion that the ordinance would "permi[t] only such middle and upper income housing as . . . w[ould] have sufficient taxable value to come close to paying its own governmental way." *Id.* at 184, 336 A.2d at 730.

in support of the zoning scheme.[27] The township tacitly admitted that its only purpose in enacting the ordinance was to restrict its future population to those of a particular financial ilk.[28] It urged that this type of fiscal zoning was legitimate since it would allow a beneficial local tax rate.[29] This contention was emphatically rejected. The court stated that the fundamentally important concept of having housing available for all classes of people could not be overridden by an individual municipality's fiscal concerns.[30] Thus, the supreme court established that the developing municipality of Mount Laurel, as well as other municipalities similarly situated, "must zone primarily for the living welfare of people and not for the benefit of the local tax rate."[31]

Although the *Mount Laurel* opinion set out broadly based judicial standards for the evaluation of individual zoning ordinances, the court's approach to the most controversial area of exclusionary zoning litigation—the fashioning of a remedy—was far more conservative.[32]

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[27] 67 N.J. at 185–87, 336 A.2d at 730–31.

[28] *Id.* at 170–71, 336 A.2d at 723.

[29] *Id.* at 185, 336 A.2d at 730–31. The court characterized this argument as basically that any municipality may zone extensively to seek and encourage the "good" tax ratables of industry and commerce, and limit the permissible types of housing to those having the fewest school children or to those providing sufficient value to attain or approach paying their own way taxwise.

Id., 336 A.2d at 731.

[30] *Id.* at 186, 336 A.2d at 731. A previous supreme court decision had held that a municipality may, through zoning, attempt to attract industrial ratables if it is "done reasonably as part of and in furtherance of a legitimate comprehensive plan for the zoning of the entire municipality." Gruber v. Mayor & Tp. Comm. of Raritan, 39 N.J. 1, 9, 186 A.2d 489, 493 (1962). The *Mount Laurel* court acknowledged that this is still proper, provided that there are ample residential zones to accommodate the appropriate variety of housing. 67 N.J. at 185–86, 336 A.2d at 731. The court recognized the problem of burdensome property taxes, but stated that "relief from the consequences of th[at] tax system will have to be furnished by other branches of government." *Id.* at 186, 336 A.2d at 731.

The township also raised an ecological argument in support of its ordinance, claiming that a lack of sewers or water service in certain areas required large-lot development in order to assure proper sewage disposal. *Id.* The justices were not persuaded by this argument since most of the land in question was "flat . . . and readily amenable to such utility installations." *Id.* For environmental issues to have an impact on a town's zoning ordinance they must be "very real" and not merely "makeweight" arguments. *Id.* at 186–87, 336 A.2d at 731.

[31] 67 N.J. at 187–88, 336 A.2d at 731–32. As to what type of municipality might not be considered to be "developing," see Fobe Assoc. v. Mayor & Council of Demarest, 74 N.J. 519, 379 A.2d 31 (1977); Pascack Ass'n, Ltd. v. Mayor & Council of Township of Washington, 74 N.J. 470, 379 A.2d 6 (1977).

[32] 67 N.J. at 191–92, 336 A.2d at 734. Part of the difficulty in constructing judicial remedies lies in the fact that courts must deal with specific cases and are not at liberty

The court did not agree with the trial judge that the entire ordinance was invalid;[33] therefore, only those aspects of the ordinance inconsistent with the new doctrine were nullified.[34] Mount Laurel was given ninety days to adopt corrective amendments.[35] No attempt was made to impose additional affirmative remedies; rather, the municipality was given the responsibility initially to provide the opportunity for the construction of low and moderate income housing by means of appropriate land use regulations.[36] Thus, the court exhibited a spirit of trust by allowing the township the "opportunity to itself act *without* judicial supervision."[37]

Justice Pashman concurred in the opinion,[38] but "would have [had] the Court go farther and faster in" providing remedies.[39] He viewed the problem as an abuse of "zoning power to advance the parochial interests of the municipality at the expense of the surrounding region and to establish and perpetuate social and economic segregation."[40] In his discussion of the widespread nature of exclusionary zoning in New Jersey,[41] Justice Pashman recognized that this practice assumes many forms.[42] He labeled certain restrictions "in-

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to impose broadly based solutions, even when confronted with a problem that is clearly widespread. *See* notes 137–145 *infra* and accompanying text; Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 531–36, 371 A.2d 1192, 1216–19 (1977). For a discussion of the appropriateness of legislative remedies, see generally Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A. L. REV. 1432, 1433–38 (1974); Mytelka & Mytelka, *supra* note 13, at 5–13; Note, *State Land Use Regulation—A Survey of Recent Legislative Approaches*, 56 MINN. L. REV. 869 (1972); Note, 74 MICH. L. REV., *supra* note 13, at 766–86.

[33] 67 N.J. at 191, 336 A.2d at 734.

[34] *Id.*

[35] *Id.* Mount Laurel was given the first opportunity to revise the details of its ordinance, rather than have the court impose revisions. *Id.*

[36] *Id.* at 192, 336 A.2d at 734.

[37] *Id.* (emphasis added). It should be noted that, as of March 1977, there had been no low or moderate income housing construction in Mount Laurel Township. Newark Star-Ledger, Mar. 27, 1977, at 26, col. 2.

[38] 67 N.J. at 193–221, 336 A.2d at 735–50. (Pashman, J., concurring).

[39] *Id.* at 194, 336 A.2d at 736. For critical comment on Justice Pashman's opinion, see Note, 74 MICH. L. REV., *supra* note 13, at 772–73.

[40] 67 N.J. at 193, 336 A.2d at 735.

Justice Pashman noted that exclusionary zoning involves two improper practices: (1) "tak[ing] advantage of the benefits of regional development without having to bear [its] burdens"; and (2) creating "enclaves of affluence or of social homogeneity." *Id.* at 195, 336 A.2d at 736. Both practices were characterized as being facially violative of both the New Jersey constitution and the zoning enabling act, as well as being "repugnant to the ideals of the pluralistic democracy which America has become." *Id.*

[41] *Id.* at 197–203, 336 A.2d at 737–40; *see* Williams & Norman, *supra* note 7, at 477.

[42] 67 N.J. at 197, 336 A.2d at 737.

herently exclusionary in effect."[43] These included minimum house size, lot size or frontage requirements[44] and the prohibition of multi-family housing.[45]

Due to the ingrained nature of these devices in New Jersey's suburbs, it was asserted that, at the very least, strong judicial action was needed.[46] He argued for the imposition of an affirmative obligation upon developing municipalities to actively cooperate with other municipalities within the appropriate region,[47] as well as with state and federal agencies which provide assistance in the planning and funding of housing,[48] so that the actual provision of low and moderate income housing would be made more realistically possible.[49]

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[43] *Id.*

[44] *Id.* at 197–99, 336 A.2d at 737–38. The significance of such requirements in placing upward pressure on new construction should not be overlooked. For example, the opinion contends that "floor space is the single most important factor contributing to differences in prices for new housing, even more important than the socio-economic status of the municipality." *Id.* at 199, 336 A.2d at 738 (relying upon G. SAGALYN & L. STERNLIEB, ZONING AND HOUSING COSTS 48 (1972)).

Although it is more difficult to calculate the effect of minimum lot size and frontage requirements on the cost of housing, there is little doubt that they, too, significantly increase prices. 67 N.J. at 200, 336 A.2d at 738–39 (relying upon Williams & Norman, *supra* note 7, at 493–97).

[45] 67 N.J. at 200–01, 336 A.2d at 739 (Pashman, J., concurring). Since multi-family housing is usually the type most affordable by those in lower economic categories the adverse effect on such groups by prohibition of such housing is obvious. *Id.* at 200, 336 A.2d at 739.

[46] *Id.* at 203, 336 A.2d at 740. Rather than rely upon action by local or state authorities, Justice Pashman would have had the court take notice, *inter alia*, of the ever increasing pressures for more and decent housing. *Id.* at 203–05, 336 A.2d at 740–41. He also stressed the danger that a lack of affirmative corrective measures would allow the perpetuation of exclusionary practices to have the effect of "freezing in" permanent exclusionary characteristics. 67 N.J. at 207, 336 A.2d at 742.

[47] *Id.* at 210, 336 A.2d at 744. This obligation is premised on the theory that once a municipality undertakes to exercise the zoning power, as permitted by statute, it must do so in a fashion consistent with the broadly based general welfare concept. *Id.* at 195, 209–10, 336 A.2d at 736, 743–44.

[48] *Id.* at 211, 336 A.2d at 744–45.

[49] *Id.*, 336 A.2d at 744. It is suggested that "[f]ailure to actively cooperate in the implementation of [state and federal] programs as effectively thwarts the meeting of regional needs for low and moderate income housing as does outright exclusion." *Id.* It might even be necessary, he continued, to impose an affirmative duty upon a municipality to actually provide low and moderate income housing, whether by public construction, ownership or management. *Id.*, 336 A.2d at 745. Justice Pashman cites, for example, the Local Housing Authorities Law, N.J. STAT. ANN. 55:14A-1 to -58 (West 1964 & Cum. Supp. 1977–1978). This statute provides, in part: "The governing body of two or more municipalities may by joint action or ordinances create a public body corporate and politic to be known as '[the] Regional Housing Authority.'" *Id.* § 14A-4.

In order to administer effectively the type of relief suggested, Justice Pashman would have required a four-step procedure at the trial court level: that court should

The approach of the New Jersey supreme court in *Mount Laurel*, revolutionary in comparison to previous judicial approaches,[50] initiated much speculation as to the way in which certain questions would be dealt with in subsequent cases.[51] For example, the court did not define the crucial terms "fair share" and "region." In addition, the court did not, as Justice Pashman would have wished, set out a detailed program for attaining specific housing goals. Several post-*Mount Laurel* commentators suggested that the majority's approach was proper in that regard, contending that the solution to the problem lies beyond the province of the judiciary.[52] However, the court did leave open the possibility that further judicial action would be forthcoming if necessary.[53] The commentators who felt that the court's broad guidelines left municipalities far too much room for evasion of the *Mount Laurel* mandate maintained that judicial intervention was an absolute necessity.[54]

Whether or not the members of the court had the *Madison Township* case in mind when they framed their remedy in *Mount Laurel* can only be conjectured.[55] However, the court was again required to immerse itself into "the dark side of municipal land use regulation"[56] when Madison Township's amended zoning ordinance was declared wholly invalid as failing to provide for that municipality's fair share of the regional need for low and moderate income housing.[57]

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determine the appropriate region; identify the need for housing, both present and future, in that region; proceed to determine and allocate a fair share of this regional need to each municipality in the region; and formulate a fitting remedial order. 67 N.J. at 215–16, 336 A.2d at 746–47. To avoid conflicting decisions in any given region, it was suggested that very early on in any litigation, all municipalities in the appropriate region be joined in the action. *Id.* at 216, 336 A.2d at 747; *see* N.J.R. 4:28-1; N.J.R. 4:30.

In referring to municipalities which had already been developed in an exclusionary manner, Justice Pashman indicated that those municipalities should have an affirmative duty to provide low and moderate income housing to the extent that such a requirement would not "grossly distur[b] existing neighborhoods." 67 N.J. at 217–18, 336 A.2d at 748.

[50] *See* notes 2–7 *supra* and accompanying text.

[51] *See, e.g.*, Mallach, *supra* note 13.

[52] *See, e.g.*, Comment, *supra* note 16, at 213–18; Note, 74 MICH. L. REV., *supra* note 13 at 793–94. *See generally* Burchell, Listokin & James, *Exclusionary Zoning: Pitfalls of the Regional Remedy*, 7 URB. LAW. 262 (1975).

[53] 67 N.J. at 192, 336 A.2d at 734.

[54] *See, e.g.*, Mallach, *supra* note 13, at 663–66; Mytelka & Mytelka, *supra* note 13, at 18–20.

[55] At the time of the *Mount Laurel* decision, the *Madison Township* case was scheduled for reargument before the supreme court after there had been a second adjudication that the township's zoning ordinance was invalid. 72 N.J. at 491–92, 371 A.2d at 1196.

[56] 67 N.J. at 193, 336 A.2d at 735 (Pashman, J., concurring).

[57] Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d

THE *MADISON TOWNSHIP* CASE

Trial Court Decisions

In 1971, Judge Furman, in the first of two trial court opinions, invalidated Madison's zoning ordinance on the ground that only a minimum amount of vacant and developable land was zoned for inexpensive homes on small lots or multi-family dwellings.[58] By so zoning, the municipality had failed to provide for "a balanced community" and fell short of meeting even local housing needs.[59] Judge Furman repeatedly referred to the *regional* housing needs and the fact that the "general welfare" mentioned in the zoning enabling legislation "does not stop at each municipal boundary."[60] The concept of region was to become increasingly significant as the litigation proceeded.[61]

Madison Township appealed the trial court decision and the supreme court granted certification.[62] The court had entertained oral argument in March 1973, but before additional arguments could be heard, the township adopted extensive amendments to its zoning ordinance.[63] Therefore, the supreme court remanded for a determination of the validity of the amended ordinance.[64]

In evaluating the 1973 ordinance, Judge Furman found that it fell "palpably short" of providing for low and moderate income housing capacity at least approximately equivalent to Madison's fair share

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223 (Law Div. 1974). For an outline of the various stages of the *Madison Township* case prior to final adjudication by the supreme court, see D. MOSKOWITZ, *supra* note 1, at 246.

[58] Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (Law Div. 1971), *cert. granted*, 62 N.J. 185, 299 A.2d 720 (1972), *on remand*, 128 N.J. Super. 438, 320 A.2d 223 (1974). The plaintiffs in the case were comprised of

> two developers, who own[ed] vacant and developable land in Madison Township, and six individuals, all with low income, representing as a class those who reside outside the township and have sought housing there unsuccessfully because of the newly adopted zoning restrictions.

117 N.J. Super. at 14, 283 A.2d at 354.

[59] 117 N.J. Super. at 21, 283 A.2d at 358. The trial court found that new housing and the one and two acre zones would be affordable only by those with incomes in the top 10% of the county. *Id.* at 16–17, 283 A.2d at 356. Yet 55% of the township's land was so zoned. *Id.* at 16, 283 A.2d at 356.

[60] *Id.* at 20, 283 A.2d at 358.

[61] *See, e.g.*, Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 441, 320 A.2d 223, 224 (Law Div. 1974); 72 N.J. at 498–500, 371 A.2d at 1200–01.

[62] Oakwood at Madison, Inc. v. Township of Madison, 62 N.J. 185, 299 A.2d 720 (1972).

[63] Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 439, 320 A.2d 223, 223 (Law Div. 1974).

[64] *Id.* at 439–40, 320 A.2d at 223.

of the regional need.[65] The new ordinance provided only "token" expansion of the areas zoned for moderate income housing and no opportunities for low income housing.[66] Of the vacant and developable residential acreage, eighty percent remained zoned for homes on one or two acre lots.[67] Thus, realistically, only "about 3,500" units, or less than ten percent of any new construction, could have been expected to be available for those whose earnings were within even the moderate income range.[68] In contrast, low and moderate income persons already accounted for twelve percent and nineteen percent, respectively, of the township's population when the ordinance was enacted.[69] On this basis, the amended ordinance was struck down in its entirety.[70]

The Supreme Court Decision

The trial court decision was again appealed, and the supreme court heard oral arguments, with particular emphasis placed upon the effect of the *Mount Laurel* decision on the issues presented.[71] In reviewing the significant factors affecting the case, the court stated that the two opinions by Judge Furman[72] reflected "the basic rationale"

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[65] *Id.* at 447, 320 A.2d at 227. Judge Furman noted that "the township planner conceded that there [was] virtually no potential for low-income housing and no incentives in the ordinance or amendments to build low or moderate-income housing." *Id.* at 445, 320 A.2d at 226–27. Thus, the amended ordinance could not promise additional low and moderate income housing units in proportion to its percentage of low and moderate income population—12% and 19% respectively. *Id.* at 447, 320 A.2d at 227.

[66] *Id.* at 446, 320 A.2d at 227. The opinion states that "[t]he zoning objective in 1970 of an elite community of high income families with few children is maintained by the 1973 amendments. The advances towards moderate-income housing opportunities are token, towards low-income housing opportunities nil." *Id.*

[67] *Id.*

[68] *Id.* Virtually no new units could be expected for those in low income categories, *i.e.*, $9,000 a year or less. *Id.*

[69] *Id.*

[70] *Id.* at 447, 320 A.2d at 227. The holding specified that Madison could not meet its obligation unless the zoning ordinance provided for low and moderate income housing approximately in proportion to its low and moderate income population. *Id.*; *see* note 65 *supra*.

[71] 72 N.J. at 491–92, 371 A.2d at 1196. The court heard oral arguments twice and "considered supplemental briefs and materials." *Id.* at 492, 371 A.2d at 1196. Among the supplemental briefs submitted were responses to a list of eighteen questions which the court directed to the parties. *See* Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803, 816–17 & n.47 (1976); D. MOSKOWITZ, *supra* note 1, at 272–75 & n.1. The questions, as presented to the attorneys, involved, *inter alia*, the appropriateness of various judicial responses including whether or not the court should determine a specific region and fair-share in zoning cases. D. MOSKOWITZ, *supra* at 271–302; Payne, *supra* at 816 n.47.

[72] Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d

underlying the *Mount Laurel* doctrine.[73] The court summarized the thrust of that doctrine as the requirement that absent "legislation providing for regional zoning authorities,"[74] developing municipalities which avail themselves of the zoning power must "serve and not impede the general welfare represented by satisfaction of the housing needs of lower income people throughout the region."[75] The Municipal Land Use Law,[76] enacted subsequent to both the second trial court decision in *Madison Township* and the supreme court decision in *Mount Laurel*, was interpreted as not diminishing "the continued viability of *Mount Laurel*."[77]

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353 (Law Div. 1971); Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 320 A.2d 223 (Law Div. 1974).

[73] 72 N.J. at 494, 371 A.2d at 1198. The only qualification to the statement was that the supreme court ruling in *Mount Laurel* rested on state constitutional grounds. *Id.*; *see* 67 N.J. at 175, 336 A.2d at 725; notes 22–24 *supra* and accompanying text.

[74] 72 N.J. at 495, 371 A.2d at 1198.

[75] *Id.* (citing the *Mount Laurel* decision, 67 N.J. at 188–90, 336 A.2d at 732–33).

It has been suggested by Professor Payne that due to the complexities of exclusionary zoning problems, as well as the inherent deficiencies of judicial solutions, the zoning enabling legislation should be delared unconstitutional on the basis that it constitutes an improper delegation of power to local governing bodies. Payne, *supra* note 71, at 819–21. Apparently, this argument was not persuasive. *See* 72 N.J. at 547–48, 371 A.2d at 1225–26.

[76] Municipal Land Use Law, 1975 N.J. Laws, ch. 291 (codified at N.J. STAT. ANN. §§ 40:55D-1 to -10, -66 to -92 (West Cum. Supp. 1976–1977)).

[77] 72 N.J. at 496–97, 371 A.2d at 1199. The court looked closely at the enumerated purposes of the act and declared that there was no conflict with its holding in *Mount Laurel*. The pertinent sections of the law enumerating its purposes read as follows:

> It is the intent and purpose of this act:
>
> a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;
>
> . . . .
>
> c. To provide adequate light, air and open space;
>
> d. To ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county and the State as a whole;
>
> e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;
>
> . . . .
>
> j. To promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through improper use of land;
>
> k. To encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site; and
>
> . . . .
>
> m. To encourage coordination of the various public and private procedures and activities shaping land development *with a view of lessening the cost of such*

The court made a fundamental determination that Madison Township was "an archetypal 'developing' municipality" as contemplated by *Mount Laurel*.[78] The town enjoyed an extensive transportation network,[79] easy access to both metropolitan centers and recreational areas[80] and "ha[d] experienced explosive growth" over the past two and one-half decades.[81] In addition, Madison Township's potential for further development was by no means exhausted.[82]

Accompanying its fantastic rate of development, Madison Township had experienced mounting upward pressure on its tax rates.[83] The zoning ordinance enacted in 1970 had been an attempt to stem the surge of municipal expenses by retarding the growth rate.[84] The revisions made in 1973 appeared to increase the housing potential,[85] but certain requirements of the ordinance would have significantly increased construction costs. The mandated minimum lot size,[86] min-

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development and to the more efficient use of land.

N.J. STAT. ANN. § 40:55D-2 (West Cum. Supp. 1976–1977) (emphasis added).

[78] 72 N.J. at 501, 371 A.2d at 1201 (citing *Mount Laurel*, 67 N.J. at 173, 187, 336 A.2d at 724, 731–32).

[79] 72 N.J. at 500–01, 371 A.2d at 1201. The township is traversed by the Garden State Parkway, State Highways 18, 34 and 35, U.S. Route 9, and county roads 527, 516 and 520. Together these highways provide easy access to the urban centers of Newark and Elizabeth, to New York City, and to the New Jersey shore area. *Id.*

[80] *Id.*

[81] *Id.* at 501, 371 A.2d at 1201. The population of the township increased from 7,366 in 1950 to 48,715 by 1970—a jump of 561%. *Id.* By 1974, the population had reached 55,000. *Id.*

[82] *Id.* at 501–02, 371 A.2d at 1201–02. The court looked to the fact that

> [a]mong the twenty-five municipalities in Middlesex County, Madison in 1970 ranked 20th lowest both in population density and housing density. Vacant acreage is plentiful; of the township's 25,000 acres, between 8,143 and 11,000 are vacant and developable. The township is a sprawling municipality marked by little continuity and spotty development.

Id.

[83] *Id.* at 501, 371 A.2d at 1201; *see* Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 14, 283 A.2d 353, 355 (Law Div. 1971), where Judge Furman pointed out that Madison's property tax rate went from one of the lowest in Middlesex County in 1950 to the county's highest in 1970.

[84] *See* 72 N.J. at 503, 371 A.2d at 1202; Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 14, 283 A.2d 353, 355 (Law Div. 1971). The first trial court opinion acknowledged that there was no dispute as to this point, noting that "[a] new township administration in 1970 determined to curb population growth significantly and thus to stablize [*sic*] the tax rate. The township was to 'catch its breath,' a phrase recurrent in the testimony." 117 N.J. Super. at 14, 283 A.2d at 355.

[85] 72 N.J. at 504, 371 A.2d at 1203. The total land available for housing was increased by 800 acres and the total potential housing capacity by 16,000 units. *Id.*

[86] *Id.* at 504–05, 371 A.2d at 1203–04. Five areas zoned for single-family units comprised 72% of the vacant residential land. Two zones calling for minimum lots of one (R-40) and two acres (R-80) "account[ed] for 42% of the total acreage within the township, 58% of its vacant developable acreage, 70% of the total acreage zoned single-

imum floor area ratio in the multi-family zone,[87] and the maximum density restrictions in the planned unit development zone[88]—known as cost generating provisions—combined to militate against the construction of high density housing affordable by low and moderate income families.[89] Exclusion of these groups, it was hoped, would reduce the need for increased municipal services.[90]

In evaluating the ordinance, the court accepted, arguendo, the

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family, and 80% of vacant developable single family acreage." *Id.* at 504, 371 A.2d at 1203. Referring to the remaining small percentage of land zoned for high density development, the court noted that in applying Justice Hall's criteria in *Mount Laurel* that lot sizes of from 9,375 to 20,000 square feet are in reality large lot zoning, *see* 67 N.J. at 183, 336 A.2d at 729–30, then nearly 70% of Madison Township was zoned for low density and thus, high cost, development. 72 N.J. at 505, 509–10, 371 A.2d at 1204, 1206.

[87] 72 N.J. at 506–07, 371 A.2d at 1204. The bedroom restrictions of the 1970 ordinance, Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 17, 283 A.2d 353, 356 (Law Div. 1971), 80% one bedroom, 20% two bedroom, were replaced by limits on the amount of construction per acre in the multi-family zone. The limit, known as a floor area ratio, was set at 10,000 square feet per acre. The effect of this restriction, when the economics of the construction industry are taken into account, would be to encourage development of "only small units (efficiencies and one bedrooms)." 72 N.J. at 506, 371 A.2d at 1204.

[88] 72 N.J. at 507–08, 371 A.2d at 1204–05. Although Madison argued that the planned unit development (PUD) zones would allow it to satisfy its low and moderate income housing obligation, the court found this to be "illusory" after close analysis. *Id.* The court stated:

> Three areas are zoned for PUD—two of which are on remote sites unserviced by water and sewer utilities. PUD requirements vary, depending upon the amount of land in the developer's tract. A Class I PUD, between 150 and 300 acres, has a maximum density of 3.5 units per acre. Of all the units constructed in a Class I PUD, a minimum of 30% must be detached single-family units, and the remainder may be medium density multi-family. A Class II PUD, between 300 and 500 acres, has a maximum density of 4.25 units per acre; a minimum of 17.5% of the units must be single-family, a maximum of 12.5% may be high density, and the remainder medium density. Class III PUDs (over 500 acres) are the most favored, with an allowable density of 5.0, 12.5% minimum single-family detached and maximum 17.5% high density. The densities allowed in the PUD zones are 20% lower than those originally proposed by the municipal planners. Moreover, it is unlikely that the highest density (5.0) will ever be utilized as there are within the PUD zones no 500-acre parcels owned by a single entity, and accumulation of the necessary number of acres is, according to the credible evidence, neither "possible nor probable."

Id., 371 A.2d at 1205 (footnotes omitted).

These density restrictions were found to be more severe than those permitted by *Mount Laurel*, which allowed as many as six and seven units per acre. *Id.* at 508 n.18, 371 A.2d at 1205.

[89] *Id.* at 508–10, 371 A.2d at 1205–06. The arrangement and restrictions in the various zones favored "low density, middle and high income residential uses." *Id.* at 509–10, 371 A.2d at 1206.

[90] *See* Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 446, 320 A.2d 223, 227 (Law Div. 1974).

town planners' use of Middlesex County as Madison's appropriate region. After the 1973 amendments, only twelve percent to seventeen percent of any new housing units would have been affordable by those earning moderate incomes.[91] In addition, realistically, no new housing would have become available for those in the low income category.[92] This effect was the result of the cost generating factors (minimum and maximum requirements) of the ordinance.[93] Thus, when these figures on housing potential were compared with the findings of the trial court as to the number of people in Madison Township earning low and moderate incomes,[94] the court concluded "that the 1973 zoning ordinance d[id] not hold the promise of an opportunity to meet that [existing] need and at the same time satisfy the *prospective continuing need* in the foreseeable" future.[95]

Among the clear failures of the ordinance were the lack of a provision for single-family homes on small lots;[96] the disproportionate amount of land zoned for expensive housing compared to that zoned for multi-family, lower cost housing;[97] and the fact that there existed "little or no . . . market" for the one and two acre single-family homes[98] for which fifty-eight percent of the total vacant developable land was zoned.[99] Not even the multi-family and planned unit development (PUD) zoning provisions were sufficiently effective to save the ordinance from invalidation.[100] For instance, even though the bedroom restrictions of the 1970 ordinance had been removed,[101] the effect of the maximum bulk and density regulations in the multi-family zone would have had the effect, economically, of dictating construction of eighty percent one bedroom and twenty percent two bedroom units.[102]

It was suggested that the town could have counteracted this effect by using its zoning power to affirmatively encourage the con-

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[91] 72 N.J. at 515, 371 A.2d at 1209. The $10,000 per year figure had been used by the trial court as the upper limit of moderate income. *Id.* at 515 n.25, 371 A.2d at 1209.

[92] *Id.* at 515, 371 A.2d at 1209.

[93] *See id.* at 515–16, 371 A.2d at 1209; notes 86–89 *supra* and accompanying text.

[94] *See* Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 446, 320 A.2d 223, 227 (Law Div. 1974).

[95] 72 N.J. at 515, 371 A.2d at 1208–09 (emphasis added).

[96] *Id.* at 515–16, 371 A.2d at 1209; *see* 67 N.J. at 187, 336 A.2d at 732.

[97] 72 N.J. at 515–16, 371 A.2d at 1208–09; *see* note 86 *supra*.

[98] 72 N.J. at 516, 371 A.2d at 1209.

[99] *Id.* at 504, 371 A.2d at 1203; *see* note 86 *supra*.

[100] *See* 72 N.J. at 516–17, 519–24, 371 A.2d at 1209–10, 1211–13; *see* notes 87–88 *supra*.

[101] 72 N.J. at 516, 371 A.2d at 1209; *see* note 87 *supra*.

[102] 72 N.J. at 516, 371 A.2d at 1209; *see* note 87 *supra*.

struction of multi-bedroom units by providing density bonuses,[103] minimum bedroom requirements,[104] and expansion of the floor-area ratio in the multi-family zone.[105] The court went so far as to endorse the concept of density bonuses, even though it was not at issue and had not been argued in the case.[106] The question whether "rent skewing"—attempting to encourage construction of lower income units by permitting the distribution of certain construction costs to relatively higher priced units—would be an acceptable approach[107] was specifically reserved as one requiring "legislative study and attention."[108]

In reviewing the PUD provisions of the ordinance, the court examined the requirement that each developer supply the roadways, water and sewerage facilities for these developments.[109] The effect of these "municipal exactions" was measured against what the court labeled as the "corollary of *Mount Laurel*."[110] That is, when the exactions "reach such proportions as to exert an exclusionary influence" by making the cost of constructing low cost housing economically un-

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[103] 72 N.J. at 517, 371 A.2d at 1209. The court described density bonus as "the bonus of . . . an additional single-bedroom or efficiency (in addition to those densities generally permitted) for every three- or four-bedroom unit constructed." *Id.* n.27, 371 A.2d at 1209.

Significantly, as the court pointed out, all of the experts at the trial had agreed "that such a device is a vital weapon in the armament of affirmative zoning for adequate housing of families in all income categories." *Id.* at 517, 371 A.2d at 1210.

[104] *Id.*, 371 A.2d at 1209.

[105] *Id.* For a discussion of various affirmative steps taken by some municipalities in other states, see Kleven, *supra* note 32, at 1436, wherein the author suggests that due to the plethora of exclusionary zoning suits being initiated, some municipalities have considered enacting inclusionary zoning ordinances as an alternative to being sued. *See also* Note, 56 MINN. L. REV., *supra* note 32.

[106] 72 N.J. at 517, 371 A.2d at 1210; *see* note 103 *supra*.

[107] 72 N.J. at 518 & n.28, 371 A.2d at 1210. Rent skewing, in general, refers

> to the imposition of a greater proportion of land, construction or other costs on one group of units in a development in order to lower the eventual rental or sale price of another group of units therein. Rent skewing can be encouraged by a municipality in two ways: requiring that a mandatory percentage of moderately priced dwellings be constructed (this is often referred to as an MPMPD ordinance) or allowing a developer a density bonus. . . .

Id. n.28, 371 A.2d at 1210. *See also* Kleven, *supra* note 32, at 1442–48.

[108] 72 N.J. at 519, 371 A.2d at 1210.

[109] *Id.* at 521, 371 A.2d at 1211–12. These requirements, known as "subdivision requirements" or "municipal exactions," *id.* at 520, 371 A.2d at 1211, are a means of having the developer bear the initial burden of improving the area surrounding a development. *See id.* at 520–22, 371 A.2d at 1211–12. This expense is in turn passed along by the developer as part of the cost of the units in the development. *See generally* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

[110] 72 N.J. at 520, 371 A.2d at 1211.

feasible, they violate the *Mount Laurel* mandate.[111] In the case of the particular exactions placed upon PUD developers by Madison Township, the court found that certain sites chosen for PUD zoning were in remote areas and were selected deliberately "to force the . . . developers and their customers to carry the burden of developing" these areas.[112] Thus, this and other cost-generating factors[113] built into the PUD provisions would have effectively precluded development of the PUD zones within the next decade.[114] The court was convinced by its analysis of these provisions that the ordinance failed to provide an opportunity for the construction of Madison's fair share of lower income housing, even based on the use of Middlesex County as the appropriate region.[115]

Least Cost Approach

"A key consideration" in *Madison Township*, and in the area of exclusionary zoning generally,[116] was the fact that in the present economic climate, private developers cannot profitably build housing for those in low and middle income categories.[117] This consideration had been noted in *Mount Laurel*,[118] but attained new significance in

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[111] *Id.*

[112] *Id.* at 522, 371 A.2d at 1212. This factor alone was sufficient for the court to state "that a prima facie case of exclusion ha[d] been made out with respect to the road and facility requirements," *id.*, thus shifting the burden to the municipality to advance arguments justifying the exactions. *Id.* at 522–23, 371 A.2d at 1212. Under these circumstances, Madison had not met this burden and therefore would be required on remand to "(1) eliminate these requirements or revise them to render them not exclusionary; (2) require proportionate donation by other property holders; or (3) relocate these or other PUD tracts nearer to utility hookups." *Id.* at 523, 371 A.2d at 1212.

[113] Particularly objectionable was the long drawn-out approval process. *Id.* at 523–24, 371 A.2d at 1212–13. The process involved three stages including an " 'informal preliminary application' " step, *id.* at 523, 371 A.2d at 1213, and concededly one full year could be consumed in completing the approval process. *Id.* Plaintiffs contended that the procedure would actually require one-and-one-half to two full years. *Id.* Such a lengthy approval process would, of course, add to the cost of the eventual units in any development. *Id.*

[114] *Id.* at 522, 371 A.2d at 1212.

[115] *Id.* at 514–15, 371 A.2d at 1208–09.

[116] *Id.* at 510, 371 A.2d at 1206.

[117] *Id.*; *cf.* D. MOSKOWITZ, *supra* note 1, at 286 (stating that developers are not likely to be sympathetic to the interests of excluded classes). *See also* Mallach, *supra* note 12, at 660–63 (stating that one of the obstacles to low and moderate income housing construction is the fact that high building costs render non-subsidized housing of that type unfeasible, even absent exclusionary zoning).

[118] 67 N.J. at 170 n.8, 336 A.2d at 722. There the court admitted that construction of low and moderate income housing requires "incentive[s] by some level of government," *id.*, yet it was not deterred from requiring municipalities to provide land for such con-

the *Madison Township* case by subtly altering "the mandate of Mount Laurel."[119]

In *Madison Township*, the defendant had argued that economic realities[120] make it impractical to attempt to enforce any obligation to provide low and moderate income housing.[121] The court, in answer to this position, conceded that it may not be realistic to presume that the mere provision of appropriately zoned vacant land would result in actual development.[122] The fact that *new* low cost housing could not be provided would not, however, excuse municipalities from attempting to comply with *Mount Laurel*. The court announced, as an alternative method of compliance, that as a bare minimum, municipalities must "adjust [their] zoning regulations so as to render possible and feasible the 'least cost' housing . . . which private industry will undertake" to construct.[123] This "least cost" alternative is only appropriate, however, in situations where private builders, even with assistance,[124] cannot meet the township's fair share of the regional need for low and moderate income housing, and then only insofar as necessary "to satisfy the deficit in the hypothesized fair share."[125] This qualification was based upon the court's recognition of the effects of a process known as "filtering down."[126] The process begins when middle to upper-middle income housing is built. Some families, occupying low and moderate income homes, will move into this new housing and leave behind an availability of lower income housing.

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struction in proportion to the township's fair share of the regional need. *Id.* at 174, 336 A.2d at 724.

[119] 72 N.J. at 513, 371 A.2d at 1208. The *Madison Township* court spoke not in terms of zoning for low and moderate income housing, as did the *Mount Laurel* court in 67 N.J. at 174, 336 A.2d at 724, but in terms of zoning for least cost housing. 72 N.J. at 513, 371 A.2d at 1208.

[120] The defendant specifically contended that in the present economy, private developers would not undertake to construct lower income housing. 72 N.J. at 512, 371 A.2d at 1207.

[121] *Id.*

[122] *Id.* The court speaks in terms of seeking "the only acceptable alternative recourse if in fact private enterprise cannot economically construct the housing needed for lower income families." *Id.*

[123] *Id.*

[124] *Id.* The assistance could be in the form of legislatively authorized incentives, *see id.*, such as "tax concessions and mandatory sponsorship of or membership in public housing projects" by the town. *Id.* at 546, 371 A.2d at 1224. Such assistance, however, requires at least legislative authorization. *Id.*

[125] *Id.* at 512, 371 A.2d at 1207.

[126] *Id.* at 513–14 & n.22, 371 A.2d at 1208. The filtering down concept only "*indirectly* provide[s] additional and better housing for" lower income families. *Id.* at 514, 371 A.2d at 1208 (emphasis added).

Thus, while not all low and moderate income families would have newly built housing available to them, the total supply of housing for that group would be enlarged.[127] By this approach, the court apparently conceded that a limited retreat from the "low and moderate income housing" requirement of *Mount Laurel* was a practical necessity. However, even judged against this "least cost" standard, the 1973 ordinance was clearly inadequate.[128]

Fair Share and Region

Faced with the inadequacies of the amended ordinance, the court focused upon the most controversial aspect of applying the *Mount Laurel* doctrine—that of the appropriate judicial remedy.[129] Significantly, there was diversity among the justices as to the appropriate relief to be ordered.[130] Much of the controversy involved the proper approach to the concepts of "fair share" and "region."[131] Judge Conford, writing for the majority, carefully framed the issue as being whether the *court* should determine the specific relevant region of which the municipality is a part, and if so, whether *it* should allocate a definitive proportion of low and moderate income housing units to the municipality as its fair share.[132] The simple answer to both parts of the issue was in the negative.[133] Yet, the length and substance of the court's discussion of these two concepts are indicative of their importance and of the degree of difficulty in dealing with them.[134]

In order to make clear just what it was attempting to do, the court set out some "[p]reliminary [c]onsiderations" to guide those

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[127] *Id.* at 513–14, 371 A.2d at 1208. Judicial discussion of this process prompted some observers to characterize the *Madison Township* decision as a "strategic 'retreat' " from *Mount Laurel*. Newark Star-Ledger, Mar. 27, 1977, at 26, col. 1.

[128] 72 N.J. at 514, 371 A.2d at 1208. The fact that the overall impact of the zoning ordinance was to encourage primarily "middle and high income residential uses," *id.* at 509–10, 371 A.2d at 1206, obviously negates the possibility of "least cost" housing. *See id.* at 514–24, 371 A.2d at 1208–13; notes 86–102 *supra* and accompanying text.

[129] *See, e.g.*, D. MOSKOWITZ, *supra* note 1, at 271–302; Mytelka & Mytelka, *supra* note 13, at 18–32; Note, 74 MICH. L. REV., *supra* note 13, at 766–86.

[130] *See* 72 N.J. at 548–54, 371 A.2d at 1226–28 (majority opinion); *id.* at 556–76, 371 A.2d at 1229–40 (Pashman, J., concurring and dissenting); *id.* at 621–23, 371 A.2d at 1262–63 (Schreiber, J., concurring and dissenting); *id.* at 625–31, 371 A.2d at 1264–67 (Mountain, J., concurring and dissenting).

[131] *See* note 130 *supra*.

[132] 72 N.J. at 497, 371 A.2d at 1199.

[133] *Id.*

[134] The opinion of the court devotes a total of 24 pages out of a total of 64 to a discussion of the various aspects of the "fair share and region" issue. *See id.* at 498–500, 524–44, 371 A.2d at 1200–01, 1213–23.

who would be required to deal with these concepts in future cases.[135] These initial remarks were followed by a more detailed discussion of fair share and region.[136] The court began with the proposition that it is not necessary for municipalities to determine specific numbers for their fair share of housing in a precise geographic region,[137] nor would the trial court be required to make such specific findings.[138] This position would appear to hinder any attempt to enforce the *Mount Laurel* principle that the township must "provide the opportunity to meet a *fair share* of the *regional* burden for low and moderate income housing needs."[139] This seeming paradox is the result of several practical considerations which persuaded the court to confine its "mandate" to generalities.[140]

First the court found, based upon all of the evidence submitted, that "numerical housing goals are not realistically translatable into specific substantive changes in a zoning ordinance."[141] Further, the court would not impose a duty on municipalities either to build or to subsidize housing.[142] A second consideration was that the diverse economic and sociological factors involved in determining region and fair share, coupled with the wide variety of approaches taken by experts, precluded the establishment of any specific formulae for determining either factor by judicial fiat.[143]

These two practicalities led the court to formulate an approach to fair share and region which appears to be another subtle alteration of the position originally stated in *Mount Laurel*. The *Madison Township* opinion directs courts and local governing bodies to look

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[135] *Id.* at 498–99, 371 A.2d at 1200 (emphasis deleted).

[136] *Id.* at 531–44, 371 A.2d at 1216–23.

[137] *Id.* at 498–99, 371 A.2d at 1200.

[138] *Id.* at 499, 371 A.2d at 1200. The court was influenced in this regard by the fact that "[t]here are too many imponderables between a zone change and the actual production of housing on sites as zoned, not to mention the production of a specific number of lower cost units in a given period of time." *Id.*

[139] *Id.* at 498, 371 A.2d at 1200 (emphasis added); *see* 67 N.J. at 174, 336 A.2d at 724. The immediate and obvious question is how may a township draft a zoning ordinance which will allow it to meet the *Mount Laurel* mandate when there is no approved method for determining its region and its fair share. *See* 72 N.J. at 588–95, 371 A.2d at 1246–49 (Pashman, J., concurring and dissenting) (urging that firm guidelines for calculation of region and fair share are imperative if an effective remedy is to be granted).

[140] *Id.* at 499, 531–44, 371 A.2d at 1200, 1216–23. For a good discussion of the concepts of fair share and region as they relate to the issue of judicial remedies, see D. MOSKOWITZ, *supra* note 1, at 303–20.

[141] 72 N.J. at 499, 371 A.2d at 1200.

[142] *Id.*

[143] *Id.*

"to the *substance* of a zoning ordinance under challenge and to *bona fide* efforts toward the elimination or minimization of undue cost-generating requirements."[144] This, it is suggested, will be more productive than judicial imposition of various fair share formulae or allocation plans.[145]

The above position, while not an absolute retreat from the *Mount Laurel* doctrine, clearly alters one of the guidelines established in that case. The instruction that courts are to look to the bona fide efforts of the municipality strongly implies that something more than exclusionary effect—the focal point of *Mount Laurel*—is to be considered when evaluating contested zoning ordinances.[146] Whether this is indeed a new policy can only be determined by future litigation. However, by this language the court has added another issue to be resolved in determining whether a zoning scheme violates the *Mount Laurel* standard.

Having recognized the deficiencies inherent in judicial attempts to solve the problem, the court nevertheless attempted to give some guidance to municipalities by discussing several approaches to the issues of fair share and region which might be minimally acceptable.[147] However, the court did digress briefly in order to offer its conception of the most practical solution: establishment of an administrative agency operating pursuant to legislative authorization.[148] Such an agency, if staffed with the necessary expertise, would be able to allocate housing needs "with relative fairness"[149] among the various municipalities within a clearly demarcated region.[150]

Turning then to the crucially important concept of region, the

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[144] *Id.* (emphasis in original).

[145] *Id.* Again, the court is apparently concerned with ultimate housing availability. *See* notes 122–128 *supra* and accompanying text.

[146] *Compare* 72 N.J. at 499, 371 A.2d at 1200 *with* 67 N.J. at 159, 174, 336 A.2d at 717, 724.

[147] 72 N.J. at 535–36, 371 A.2d at 1219.

[148] *Id.* at 531–33 & n.37, 371 A.2d at 1216–17; *see* notes 141–43 *supra* and accompanying text.

[149] 72 N.J. at 531, 371 A.2d at 1217.

[150] *Id.* at 531–34, 371 A.2d at 1216–18. The language used to make this point is quite strong:

> We take this occasion to make explicit what we adumbrated in *Mount Laurel* and have intimated above—that the governmental-sociological-economic enterprise of seeing to the provision and allocation throughout appropriate regions of adequate and suitable housing for all categories of the population is much more *appropriately a legislative and administrative function* rather than a judicial function to be exercised in the disposition of isolated cases.

Id. at 534, 371 A.2d at 1218 (footnote omitted) (emphasis added).

majority set forth, as a basic premise, that the relevant region should be one which corresponds to that area from which the population can be expected to come, in view of existing job opportunities and transportation.[151] The designation of a single county as such a region was labeled unrealistic and disapproved.[152]

Although the stated guideline for "region" is, of necessity, very general,[153] the court did indicate, by way of illustration, the type of region which might be acceptable.[154] An ordinance drafted pursuant to "an official fair share housing study of a group of counties"[155] authorized by either the legislative or executive branch may, according to the court, warrant "prima facie judicial acceptance" insofar as the region utilized.[156] The key to this illustration is the reliance upon "fair share allocation plans executed under official or quasi-official auspices"[157] as opposed to those decreed by judicial fiat or artificially constructed by a defendant municipality.[158] Anticipating that municipalities might rely upon regions determined by experts, the court advised that such experts must give proper attention to "areas from which the lower income population of the municipality would *substantially* be drawn absent exclusionary zoning."[159] Such a region

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[151] 72 N.J. at 537, 371 A.2d at 1219.

[152] *See id.* at 537–38, 371 A.2d at 1219–20. This of course raises questions as to the appropriateness of ten "regions" consisting of single counties as determined by the Division of State and Regional Planning. NEW JERSEY DIVISION OF STATE AND REGIONAL PLANNING, A STATEWIDE HOUSING ALLOCATION PLAN FOR NEW JERSEY 10 (Preliminary Draft) (Nov. 1976) [hereinafter cited as STATEWIDE HOUSING ALLOCATION PLAN]. Those single-county regions are listed as: Atlantic, Cape May, Cumberland, Hunterdon, Mercer, Monmouth, Ocean, Salem, Sussex and Warren. *Id.*

[153] In order to remain consistent with a previous statement in the preliminary considerations section that specific designation of region and fair share are not required, 72 N.J. at 498–99, 371 A.2d at 1200, the court's general considerations, *id.* at 531–44, 371 A.2d at 1216–23, must be viewed merely as broad suggestions.

[154] *Id.* at 537–41, 371 A.2d at 1219–22.

[155] *Id.* at 537–38, 371 A.2d at 1220. The Statewide Housing Allocation Plan of the Division of State and Regional Planning, *see* note 152 *supra*, is not to be accorded the status of prima facie acceptability since it is still in the preliminary stage. 72 N.J. at 538, n. 43, 371 A.2d at 1220.

[156] 72 N.J. at 538, 371 A.2d at 1220. Here, too, the court refused to establish an absolute guide. The wording is that such regions *"conceivably might"* be acceptable. *Id.* (emphasis added).

[157] *Id.* at 538–39, 371 A.2d at 1220. This is consistent with the basic premise that the problem is best dealt with legislatively or administratively. *See id.* at 534, 371 A.2d at 1218.

[158] *See id.* at 539, 371 A.2d at 1221. Examples of the type of region that would be favored include the five county region established by the Miami Valley (Dayton, Ohio) Regional Planning Commission, the fifteen county region comprising the Metropolitan Washington Council of Governments, and the seven county area covered by the Metropolitan Council of the Twin Cities (Minneapolis-St. Paul). *Id.*, 371 A.2d at 1220–21.

[159] *Id.*, 371 A.2d at 1221 (emphasis in original).

would be roughly equivalent to "the relevant housing market area."[160]

Once a valid region is determined, there remains the problem of allocating a fair share of that region's need for lower income housing.[161] The court acknowledged that, in some respects, this poses an even greater problem than the initial determination of region.[162] Primarily, this is due to the fact that there is a greater variety in the approaches which experts have used in calculating "fair share."[163] The court emphasized this point to buttress its view that the problem should be dealt with legislatively and administratively —not judicially.[164] Thus, the only guideline offered concerning fair share was the broad proposition that once the appropriate region is determined, an allocation of low and moderate income housing which "correspond[s] at least *roughly*"[165] with the existing proportion of low and moderate income families in the region "would appear prima facie fair."[166]

Even when measured against these broad guidelines, the fair share approach urged in defense of Madison Township's ordinance was found to be seriously inadequate. The township had relied upon two housing allocation studies, both of which utilized Middlesex County as the appropriate region.[167] Although the experts arrived at

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[160] *Id.* at 540, 371 A.2d at 1221.

[161] *Id.* at 541, 371 A.2d at 1222. One author expected that the court would decide the important question of the determination of fair share in the *Madison Township* case. D. MOSKOWITZ, *supra* note 1, at 307. However, whatever further affirmative judicial action was foreshadowed by the *Mount Laurel* decision has not been realized.

[162] 72 N.J. at 541, 371 A.2d at 1222. The court states that "harm to the objective of securing adequate opportunity for lower income housing is less likely from imperfect allocation models than from undue restriction of the pertinent region." *Id.* Thus, the apparent problem for the court was what to say at all about fair share.

[163] *Id.* An allocation model adopted by New Jersey's Division of State and Regional Planning was guided by two principles:

> (1) the allocation should improve the present imbalance of responsibility for meeting low-and moderate-income housing needs in a "fair share" manner, and
> (2) the allocation should take into account the relative suitability or capability of municipalities to assume more responsibility for providing low-and-moderate-income housing.

STATEWIDE HOUSING ALLOCATION PLAN, *supra* note 152, at 10–13.

[164] 72 N.J. at 541–42, 371 A.2d at 1222.

[165] *Id.* at 543, 371 A.2d at 1223 (emphasis added).

[166] *Id.* The wording of this "guideline" reaffirms the analysis that the court was cautiously avoiding establishing any absolutes on this issue. *See* notes 146–50 *supra* and accompanying text.

[167] 72 N.J. at 525, 371 A.2d at 1213–14. The first housing study was done by a planner named Kim in 1972 for the Middlesex County Planning Board. *Id.*, 371 A.2d at 1214. The second study was done in 1974 specifically for Madison Township by its planning adviser, Abeles. *Id.*

similar fair share estimates, the court found two basic flaws common to both studies which precluded any justifiable reliance on them.[168] First, the use of Middlesex County as the relevant region was not realistic.[169] As a result, any fair share determination based upon that region would be inherently suspect.[170] An equally significant failure on the part of both studies was the bias toward measuring the existing need for lower income housing rather than the prospective need.[171] Obviously, this aspect of the studies precluded their use in any attempt to measure Madison Township's continuing need for the foreseeable future.[172]

Remedy and Remand

The remand by the court basically did five things: it required the trial court to give due consideration to environmental evidence offered in support of certain aspects of Madison Township's zoning ordinance;[173] it declined to order affirmative action on the part of

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[168] *Id.* at 525–31, 371 A.2d at 1213–16. The Kim study allocates 1,600 lower income units as Madison's fair share as of 1975, while the Abeles study arrived at a figure of 1,800 units. *Id.* at 525, 371 A.2d at 1214. A study done by plaintiffs' planner allocated 3,000 units for the same time period. *Id.* at 526, 371 A.2d at 1214.

[169] *Id.* at 528 & n.35, 531, 536, 371 A.2d at 1215, 1216, 1219. The court was receptive to the idea of aligning the relevant region with the "housing market area," which in this case could place Madison in a region that "includes at least the seven northeastern counties of New Jersey." *Id.* at 528 n.35, 371 A.2d at 1215. Presumably those counties would be Bergen, Essex, Hudson, Middlesex, Morris, Passaic, and Union.

The court also takes notice of the fact that the Department of Community Affairs, through its Division of State and Regional Planning, had issued a preliminary draft of the Statewide Housing Allocation Plan. 72 N.J. at 528 & n.35, 371 A.2d at 1215. The Division of State and Regional Planning places Middlesex County in a region containing Bergen, Essex, Hudson, Morris, Passaic, Somerset, and Union Counties. STATEWIDE HOUSING ALLOCATION PLAN, *supra* note 152, at 10. The plan bases the determination of appropriate region on several factors including the sharing of housing needs, "socio-economic interdependence," and data availability and reliability as to the first two factors. *Id.* at 7–9. The undertaking of the allocation plan was authorized by Executive Order No. 35 (April 2, 1976) of Governor Brendan Byrne. *See also* 72 N.J. at 531–33 & n.37, 371 A.2d at 1217.

[170] *See* 72 N.J. at 531–36, 371 A.2d at 1216–19.

[171] *Id.* at 525–26, 529, 371 A.2d at 1214, 1216. In referring specifically to the Abeles study, the court recognized that of the 1,784 lower income units assigned as Madison's fair share, 1,394 represented the existing need in Madison alone. *Id.* at 529–30, 371 A.2d at 1216. In addition, there was no projection of the lower income housing need beyond 1975. *Id.* at 525–26, 371 A.2d at 1214.

[172] *See id.* at 525–26 & n.33, 371 A.2d at 1214.

[173] *Id.* at 545, 371 A.2d at 1224. Judge Furman had ruled that evidence as to environmental matters need not be considered since ample land was available to zone for high density, low cost housing without disturbing ecologically sensitive areas. Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 447, 320 A.2d 223, 227–28 (Law Div. 1974).

Madison Township to actually build or subsidize housing;[174] it invalidated the zoning ordinance, but only insofar as it required modification "to create the opportunity for a fair and reasonable share of the least cost housing needs of Madison's region";[175] it directed the trial court to supervise the revision of the zoning ordinance to insure compliance with the order and indicated that the trial court could retain experts to formulate a proper ordinance in the event the township's revision was found inadequate;[176] it granted specific relief to the corporate plaintiffs who owned vacant land in the township, by ordering Madison Township to issue a permit for the construction of the housing development proposed by the corporation with the express stipulation that a minimum of twenty percent of the units be allocated to low or moderate income families.[177]

By granting affirmative relief to the corporate plaintiffs and by directing judicial supervision of compliance with the remainder of the order, the court went a step further than it had originally gone in *Mount Laurel*.[178] The court found this to be a reasonable step in light of the settled state of the basic law and the protracted nature of the litigation.[179] Thus, although the court clearly announced its intention to refrain from imposing specific remedial plans in an area which lends itself more appropriately to legislative solutions,[180] it also made clear by this order that the judiciary would continue to struggle toward acceptable solutions so long as these questions were presented to it.[181]

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[174] 72 N.J. at 546–47, 371 A.2d at 1224–25.

[175] *Id.* at 552–53, 371 A.2d at 1227–28.

[176] *Id.* at 553–54, 371 A.2d at 1227–28. This ruling went beyond *Mount Laurel* where the court refused to order judicial supervision. *See* 67 N.J. at 192, 336 A.2d at 734.

[177] 72 N.J. at 548–51, 371 A.2d at 1226–27. The developer had represented in its original plans that a minimum of 20% of the units constructed would be allocated to low or moderate income families. *Id.* at 551, 371 A.2d at 1227.

[178] *Compare id.* at 551, 552–54, 371 A.2d at 1226–28 *with* 67 N.J. at 192, 336 A.2d at 734. These aspects of the order were consistent with the *Madison Township* court's attempt to provide a practical approach to the problem. The court's basis for this change in position was a matter of policy:

> Considerations bearing upon the public interest, justice to plaintiffs and efficient judicial administration preclude another generalized remand for another unsupervised effort by the defendant to produce a satisfactory ordinance. The focus of the judicial effort after six years of litigation must now be transferred from theorizing over zoning to assurance of the zoning opportunity for production of least cost housing.

72 N.J. at 552–53, 371 A.2d at 1228.

[179] *See* 72 N.J. at 552, 371 A.2d at 1227–28.

[180] *Id.* at 498–500, 371 A.2d at 1200–01.

[181] *Id.* at 535–36, 371 A.2d at 1219. The court took the position that

The Concurring and Dissenting Opinions

Four Justices filed separate opinions in the case.[182] In a lengthy opinion, Justice Pashman concurred in the invalidation of the ordinance, but dissented as to the propriety and effectiveness of the remedies granted.[183] He again urged the court to proceed "farther and faster" in providing "powerful judicial antidotes" with which to combat exclusionary zoning.[184] In his *Mount Laurel* opinion, Justice Pashman had expressed concern that towns would not voluntarily comply with the court's mandate absent judicial supervision.[185] This

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> unless and until other appropriate governmental machinery is effectively brought to bear the courts have no choice, when an ordinance is challenged on *Mount Laurel* grounds, but to deal with this vital public welfare matter as effectively as is consistent with the limitations of the judicial process.

Id.

[182] Separate opinions were filed by Justice Pashman, *id.* at 555–619, 371 A.2d at 1229–61 (concurring and dissenting); Justice Schreiber, *id.* at 619–23, 371 A.2d at 1261–63 (concurring and dissenting); Justice Mountain, *id.* at 623–31, 371 A.2d at 1263–67 (concurring and dissenting); and Justice Clifford, *id.* at 631–38, 371 A.2d at 1267–71 (concurring).

[183] *Id.* at 555–56, 371 A.2d at 1229.

[184] *Id.* at 556, 371 A.2d at 1229. This exhortation was similar to that given in his *Mount Laurel* opinion. *See* 67 N.J. at 194, 336 A.2d at 736 (Pashman, J., concurring). For samples of pro and con reactions to Justice Pashman's viewpoint, see Comment, *supra* note 16, at 215–16 and Note, 74 MICH. L. REV., *supra* note 13, at 772–75.

Justice Pashman based this call for affirmative judicial intervention upon an analysis of the "evils which the widespread practice of exclusionary zoning inflicts upon the State." 72 N.J. at 556, 371 A.2d at 1229. Several of the direct effects of exclusionary practices include exacerbation of the housing shortage; an undermining of efficient land use; erection of barriers for low paid industrial workers who wish to reside in the towns in which they work; and acceleration of the deterioration of our cities by building walls around them "over which only the well-to-do can escape." *Id.* at 557–59, 371 A.2d at 1230–31.

[185] *See* 67 N.J. at 193–95, 336 A.2d at 735–36. Justice Pashman elaborated on this argument in his *Madison Township* opinion, where he pointed out that towns fear that compliance with *Mount Laurel* will increase the demand for services without a comparable increase in revenues, thus putting upward pressure on the property tax. 72 N.J. at 561, 371 A.2d at 1232. This fear is the basis for "fiscal zoning" as discussed in the trial court opinions. *See* Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 18, 283 A.2d 353, 357 (Law Div. 1971); Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438, 446–47, 320 A.2d 223, 227 (Law Div. 1974). To this fear there may be added "long-standing social and racial fears and prejudices." 72 N.J. at 562, 371 A.2d at 1232 (Pashman, J., concurring and dissenting). Given such circumstances, it is understandable that town officials who believe that courts will hesitate to enforce *Mount Laurel* would rather take their chances with a law suit than act voluntarily. *Id.* at 563, 371 A.2d at 1233.

Justice Pashman also warned that failure to supervise compliance with court orders would result in towns devising new methods, not previously ruled upon, to circumvent the trial court's order. *Id.* at 564–65, 371 A.2d at 1234. *See also* Mytelka & Mytelka, *supra* note 13, at 29–30.

concern, the validity of which is demonstrated by the protracted nature of the litigation in the *Madison Township* case, became the basis for the proposal of detailed guidelines to "fuel the judicial imagination."[186] Justice Pashman therefore set forth with great specificity the remedies which he felt would guarantee protection of the plaintiff's rights.[187] He criticized the majority for stopping short of mandating a specific means of determining "fair share" and "region,"[188] since without such calculations, there is no way for the court to measure compliance with its order.[189]

As an integral part of his position, Justice Pashman proposed various positive actions which the court could utilize to insure actual relief.[190] Among the remedies suggested were such drastic steps as

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[186] 72 N.J. at 576, 371 A.2d at 1240 (Pashman, J., concurring and dissenting). The objectives of the judicial remedies were stated to be: 1) to prohibit exclusionary abuses of the zoning power; 2) to provide a remedy for past zoning discrimination; 3) to maintain the attractiveness of the township as a place to live; 4) to "respect the principle of local prerogative in land use planning"; and 5) to order "judicially manageable" relief. *Id.* at 577–81, 371 A.2d at 1240–42.

The procedure to be used in reaching these objectives is identical to that which Justice Pashman had set forth in his *Mount Laurel* opinion. *See* note 49 *supra*. However, he further suggested that all municipalities in the relevant region be required to conduct a study of the housing needs in their region and to formulate specific fair shares. 72 N.J. at 583, 371 A.2d at 1243. The trial court should then have the power, based upon this formulation, to order the defendant municipality to draft a program which would meet its obligations under the regional plan. If the program proved inadequate, the trial court should be empowered to impose appropriate modifications and order their implementation. *Id.* at 584–85, 371 A.2d at 1244. *See also* Mytelka & Mytelka, *supra* note 13, at 26–29.

[187] 72 N.J. at 582–616, 371 A.2d at 1243–60 (Pashman, J., concurring and dissenting).

[188] *Id.* at 589–95, 371 A.2d at 1246–49. The Justice stated:

> I am baffled by the majority's pronouncement that, while Madison Township is obligated to create the opportunity for a fair and reasonable share of the housing needs of its region, "no formulaic determination or numerical specification of such a fair and reasonable share is required." . . . Because this approach gives the trial court no reliable way of measuring local compliance with the Court's remedial order, I fail to see how it will encourage implementation of an effective remedial plan.

Id. at 589, 371 A.2d at 1246 (citation omitted) (quoting *id.* at 553, 371 A.2d at 1228).

In determining a municipality's fair share, Justice Pashman would have the trial court consider factors such as the amount of vacant, developable land within the town *vis-à-vis* the region; the suitability of the land for lower income developments, considering access to transportation and utilities; availability of employment; the population density of the town as compared to that of the region; and the extent to which the town has accepted or avoided its obligations under *Mount Laurel*. Based upon these factors, the trial court should fix a specific number of units as the municipality's fair share. *Id.* at 594–95, 371 A.2d at 1249.

[189] *Id.* at 589–90, 371 A.2d at 1246. He also suggested, however, that the trial court judge should determine how much weight is to be given to each of the various factors. *Id.* at 595, 371 A.2d at 1249.

[190] *Id.* at 595–616, 371 A.2d at 1249–60. The danger in not awarding specific relief is

enjoining approval of any type of development in the municipality until provisions have been made for lower income housing;[191] ordering the municipality to adopt inclusionary zoning provisions;[192] and requiring that the local governing body form a municipal housing authority to fund or construct low income housing.[193] Justice Pashman concluded that, it is only through the use of "such direct and forceful action,"[194] that any progress will be made in putting an end to "the barriers of exclusionary zoning."[195]

The opinions of Justices Schreiber, Mountain and Clifford are helpful in deciphering the significance of the case. The fact that all three Justices highlight the complexity of constructing judicial remedies in exclusionary zoning cases[196] is indicative of the practical problem the court faced. The three opinions also echo the majority position that the final solution to the problem is best handled legislatively.[197]

The remarks of Justice Schreiber pinpoint the difficulty incisively —"the wrong condemned in *Mt. Laurel*" can only be remedied by striking at the underlying causes: decaying cities and a statewide tax structure which relies primarily on the local property tax.[198] Justice

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that plaintiffs achieve only a hollow victory. *Cf.* Mytelka & Mytelka, *supra* note 13, at 6 (suggesting that if courts do not act quickly, actual relief is nil). One commentator has stated that

> [t]he mere judicial enunciation of general principles and the reliance on municipal initiative to achieve compliance are not likely to lead to more than token steps and thus will not result in the construction of more than a token amount of the housing that is, after all, the object of this sound and fury.

Mallach, *supra* note 13, at 666.

[191] 72 N.J. at 610–11, 371 A.2d at 1257.

[192] *Id.* at 612–14, 371 A.2d at 1258–59.

[193] *Id.* at 615–16, 371 A.2d at 1259–60.

[194] *Id.* at 619, 371 A.2d at 1261.

[195] *Id.*

[196] *See id.* at 621, 371 A.2d at 1261 (Schreiber, J., concurring in part and dissenting in part); *id.* at 623–24, 371 A.2d at 1263–64 (Mountain, J., concurring and dissenting); and *id.* at 631, 371 A.2d at 1268 (Clifford, J., concurring).

[197] *Id.* at 621–22, 371 A.2d at 1262 (Schreiber, J., concurring in part and dissenting in part); *id.* at 624, 371 A.2d at 1264 (Mountain, J., concurring and dissenting); *id.* at 632, 371 A.2d at 1268 (Clifford, J., concurring).

[198] *Id.* at 619–21, 371 A.2d at 1261–62 (Schreiber, J., concurring in part and dissenting in part). Justice Schreiber noted that "[t]he underlying cause of this state of affairs is New Jersey's tax structure, essentially local in nature, which generates most of its revenues from real estate assessments." *Id.* at 619, 371 A.2d at 1261. It is also significant to note, as pointed out by Justice Schreiber, that in terms of the approach to exclusionary zoning litigation

> [n]o party in th[e] proceedings has advocated that the judicial remedy be directed toward elimination of the causes. Instead efforts, following the lead of *Mt. Laurel*, have been directed toward the amelioration or elimination of the

Mountain, for his part, cautioned that the court should be careful not to assume, by its activist approach to zoning cases, a role that has traditionally belonged to an elected branch of government.[199] He suggested that the problem would be better dealt with by a legislatively established statewide agency to oversee land use regulation.[200] However, he did admit that any attempt to introduce some form of statewide zoning agency would "provoke immediate opposition."[201] Justice Clifford agreed with Justice Mountain that "the judiciary's 'power of legitimacy' "[202] might not survive repeated forays into areas "better and more effectively dealt with elsewhere."[203] He recognized that judicial solutions may be "neither entirely satisfactory nor wholly successful."[204] However, he viewed this infirmity as a "by-product of

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result, namely modification of the exclusionary provisions of the zoning ordinance.

Id. at 621, 371 A.2d at 1262 (emphasis added).

[199] *Id.* at 627, 371 A.2d at 1266 (Mountain, J., concurring and dissenting). Justice Mountain's basic thesis is "that the solutions of these problems, individually and in the aggregate, will be far more speedily and effectively devised by the Legislature than by the courts." *Id.* at 624, 371 A.2d at 1264.

[200] *Id.* at 627, 371 A.2d at 1266. Justice Mountain stated that any official agency legislatively established to oversee statewide land use regulation would be able to survey the nature of exclusionary zoning problems in depth and consult with appropriate experts in devising solutions. *Id.*

Justice Mountain characterized as a weakness in the majority position the fact that "perhaps somewhat naively, it places . . . undue reliance upon good faith effort, despite the fact that, for understandable if not laudable reasons, any such effort has thus far been conspicuous by its almost total absence." *Id.* at 625, 371 A.2d at 1264. He immediately added to this the admission that "there is probably nothing better to offer as a judicially devised alternative." *Id.*

[201] *Id.* at 629–30, 371 A.2d at 1267.

[202] *Id.* at 635, 371 A.2d at 1270 (Clifford, J., concurring) (quoting *id.* at 628, 371 A.2d at 1266 (Mountain, J., concurring and dissenting)).

[203] *Id.* at 635, 371 A.2d at 1270 (Clifford, J., concurring). Justice Clifford distilled from all of the other opinions the sentiment that the ultimate solution to the causes of exclusionary zoning must be a legislative one, and characterized the decision as being "not at all in any spirit of twitting the legislature but of something between entreaty and persuasion." *Id.* at 632, 371 A.2d at 1268.

The Justice's remarks uncover yet another problem arising from the onslaught of exclusionary zoning litigation.

> Recognizing the difference between what should come to the courts and what should be dealt with by other institutions is a difficult enough exercise in the abstract; but striking that balance in practice and then maintaining it seems as much to elude our powers of management as those of our co-ordinate branches of government. The spectrum of views expressed by my colleagues demonstrates that disagreement on this fundamental problem underlies at least part of today's division of the Court.

Id.

[204] *Id.* at 631, 371 A.2d at 1267–68.

the *judicial* function being called upon to solve the extraordinarily complex problems underlying th[e] litigation."[205]

CONCLUSION

The language and tone of all of the opinions in the *Madison Township* case attest to the fact that there is basic solidarity on one point: the problems posed by exclusionary zoning are inherently complex and are difficult to resolve within the framework of an adversary proceeding. Almost by definition, the underlying issues of local land use control and the nature of New Jersey's tax structure must be dealt with in any attempt to resolve the exclusionary zoning dilemma. Viewed from this perspective, therefore, the task of any court faced with the difficulty of providing practical remedies is additionally complicated by the problem of the proper bounds of judicial restraint.

There is no doubt that the majority opinion recognized these complexities. The court attempted to maintain the basic principles enunciated in *Mount Laurel* while adjusting the remedy to meet practical realities. By so doing, the court has apparently kept open the possibility that in future cases remedies may again be adjusted if the circumstances so demand. Such a reading of the case is wholly consistent with the overall evolving approach the New Jersey supreme court has taken in zoning litigation. In addition, it holds the promise that plaintiffs in zoning cases may indeed see more specific remedies awarded if there is a continuing failure to find appropriate relief elsewhere.

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[205] *Id.* (emphasis in original). Justice Clifford voted with the majority on the basis that it "represent[ed] the best judicial accommodation of the present controversy to *Mount Laurel's essential principles*." *Id.* at 638, 371 A.2d at 1271 (emphasis added).